Wallace International de Puerto Rico, Inc. and International Silver de Puerto Rico, Inc. *and* Congreso de Uniones Industriales de Puerto Rico. Case 24–CA–7424

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 18, 1997, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wallace International de Puerto Rico, Inc. and International Silver de Puerto Rico, Inc., San German, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Within 14 days from the date of this Order, offer Eddie Hernandez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

''(b) Make Eddie Hernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.''

3. Substitute the following for the last sentence of paragraph 2(d).

''In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 1996.''

4. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN GOULD, concurring.

The employee unlawfully discharged in this case is not a model employee. Yet, it is axiomatic that this fact is not dispositive of the question of whether the Act has been violated. *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943). The ''for cause'' proviso in the subsequently enacted Taft-Hartley amendments does not alter this result. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 fn. 6 (1983).

The conduct of an unlawfully discharged employee does and should affect the remedy. See, e.g., *Precision Window Mfg. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992). Under my approach to *Transportation Management*, the remedy for the discriminatee whose performance or conduct is deficient is more important—just as it is to an arbitrator interpreting the provisions of a collective-bargaining agreement. *Paper Mart*, 319 NLRB 9, 13 (1995). But here, given the conduct of the employee and the employer's treatment of other similarly situated, the Board traditional remedies are appropriate.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, the Respondent, in its brief, contends that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

In finding that the Respondent harbored antiunion animus, the judge relied on two prior cases against the Respondent, 314 NLRB 1244 (1994), and Case 24–CA–6969 (currently pending before the Board). In agreeing with the judge's animus finding, we do not rely on Case 24–CA–6969. Instead, we find sufficient evidence of animus in 314 NLRB 1244, as well as the credited testimony of Arturo Figueroa Rios that during a proceeding under the Puerto Rico penal code, Supervisor Manuel Cruz told the judge in that case that Cruz had instructions from his immediate supervisor to ''watch all those that were involved in the Union movement, particularly Mr. Eddie Hernandez, who was one of the leaders.''

[2] The judge recommended that the Board issue a broad order requiring the Respondent to cease and desist from violating the Act ''in any other manner.'' We find that a broad cease-and-desist order is not warranted in this case. Accordingly, we shall substitute a narrow cease-and-desist order requiring the Respondent to cease and desist from violating the Act ''in any like or related manner.'' See *Hickmott Foods*, 242 NLRB 1357 (1979). Further, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also issue a new notice to employees to conform to the Order and to add an expunction provision inadvertently omitted by the judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their activity on behalf of Congreso de Uniones Industriales de Puerto Rico, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Eddie Hernandez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eddie Hernandez whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Eddie Hernandez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WALLACE INTERNATIONAL DE PUERTO RICO, INC. AND INTERNATIONAL SILVER DE PUERTO RICO, INC.

Virginia Milan-Giol, Esq., for the General Counsel.
Yldefonso Lopez-Morales, Esq., of San Juan, Puerto Rico, for the Respondent.
Jose Figueroa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at San Juan, Puerto Rico, on the General Counsel's amended complaint which alleged that on May 3, 1996, the Respondent discharged Eddie Hernandez in violation of Section 8(a)(3) of the National Labor Relations Act (the Act).[1]

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Hernandez was discharged for cause.

On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

Wallace International de Puerto Rico, Inc. and International Silver de Puerto, Inc. (the Respondent) are a joint employer and are engaged in the manufacture of silver flatware at a facility in San German, Puerto Rico. In the course of this business, the Respondent annually purchases and receives good and products valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Congreso de Uniones Industriales de Puerto Rico (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

This the third matter before an administrative law judge arising out of the Union's attempt to organize and represent the employees of the Respondent.[2] In brief, following an organizational campaign in late 1992, an election was held in which the Union did not receive a majority of the votes cast. Objections were filed as well as charges. Administrative Law Judge King found certain violations of the Act and recommended that the election be set aside and a new one held. This recommendation was not adopted by the Board because subsequent to his decision, the representation case had been severed from the unfair labor practice case, the employees having concluded that the Union could file a new petition and have a second election more quickly. There was a second petition for representation, a second election on June 22, 1994, which the Union also lost, and a second set of unfair labor practice charges. Administrative Law Judge Beddow recommended that the election be set aside and that the Respondent be ordered to bargain with the Union based on a demonstrated majority by authorization cards. This decision is pending before the Board.

Though Hernandez did not take a particularly active role in the first election campaign, he was the principal union leader in the second. He solicited authorization cards and collected cards from other solicitors. He also passed out union literature and spoke for the Union to other employees. The Respondent does not deny knowledge of his union activity.

[1] Other allegations were resolved prior to the hearing.

[2] The previous cases are: 314 NLRB 1244 (1994), and JD–126–95 (Aug. 10, 1995).

In addition, Hernandez filed a grievance with Occupational Safety and Health Office of the Puerto Rico Department of Labor and Human Resources on January 12, 1995. This resulted in an investigation from February 13 to May 21 and ultimately a fine to the Respondent of $6050.

And on February 1, 1996, Hernandez filed a grievance with Department of Labor claiming that the Respondent violated Puerto Rico labor statutes concerning his and other employees vacation. There is no reliable evidence of whether or to what extent this resulted in backpay liability to the Respondent. Nevertheless, it is undenied that in fact he filed a claim and it was investigated.

On May 2, 1996, Hernandez received a warning for ''wasting too much time in the bathrooms. He responded by saying if there was any regulation that said how much time one should be in the bathrooms. At this moment Eddie Hernandez entered the bathroom at 11:02 a.m. and left a 11:18 a.m. Also present were Messrs. Francisco Lugo and Felix Rosado.''

The next day Hernandez was called into the Manager's office and given a discharge letter which stated, in part, ''As you well know, during the past year and a half you a have been subject of multiple disciplinary actions, both verbal as well as written for various violations as an employee.'' The letter went on to list categories of his alleged infractions as

> your negative attitude towards your job, your supervisors and various co-workers; your repeated challenge to authority which has caused you to commit various acts of insubordination; lack of respect; your attitude of placing at risk the security of your co-workers; and the abandonment of your work area before your departure time. In addition, despite the fact that your supervisors have called it to your attention, you continue your practice of remaining in the bathroom for a long periods of time during working hours, as you have done for the past two days.

In support of its defense, the Respondent offered into evidence six written warnings beginning with one of October 26, 1994. This was for refusing to perform his regular duties and was alleged in the last case to have been in violation of Section 8(a)(3). Judge Beddow concluded that it was not.

On January 11, 1995, Hernandez was given a written warning for refusing to perform his regular duties, having claimed that the substitute mask provided by the Respondent was not appropriate. This was stated to have been an act of insubordination and that if he did not improve his attitude, ''we will be forced to take more severe disciplinary measures which could include permanent job and wage separations.''

On January 24, 1995, he was given a written warning for having left his work area before quitting time.

He was given a ''final warning'' on October 2, 1995, for having circulated a list purporting to identify 39 types of cuckolds and telling a supervisor that the supervisor was number 21. (Hernandez testified that he though this list funny and wanted to share it with fellow employees. He denied having said the supervisor was number 21.)

On February 1, 1996, Hernandez came to work at 9:30 a.m. and immediately took the 9:30 a.m. break. For taking the break on arriving at work he was given a written warning. And on March 11 he was given a warning for having left his work station with 5 minutes left in the workday, getting his timecard, and standing at the clock fanning himself with the card.

The Respondent also offered the testimony of Nelson Jiminez, who stated that Hernandez had said he was number 21 on the cuckold list; of Wilfredo Serrano, who said that one time Hernandez peeled his car tires in the company parking lot; of Freddie Nazario who stated he saw Hernandez chatting with coworkers in the bathroom; of Luis Ricardo Alabaream who said the amount of time Hernandez spent in the bathroom was ''incredible;'' and of Rene Logo Morales, who gave Hernandez the warning for taking a break on arriving at work. Lastly, the Respondent's general manager, Jose Arroyo Martinez, testified that Hernandez was discharged ''because of cumulative conduct that been accumulating for about three years, negative conduct'' which included excessive use of the bathroom.

Other employees have also received numerous written warnings for a variety of infractions of company rules. Thus, Luis Baez was warned on January 22, 1991, for frequently leaving and being absent from his work without a justified excuse; on March 20, 1991, for not returning to work after lunch; on and unknown date for a timecard violation; on September 28, 1993, for negligence; on June 14, 1996 (with two other employees), for going to the bathroom; on August 21, 1996, for taking too long in the bathroom; on August 26, 1996, for carelessness; and on January 28, 1997, for negligence. Baez is still employed.

Ramon Ramos was given a written warning for two absences on January 28, 1994, which noted that he had been previously warned; he received a warning for two absences on February 17, 1994; on September 23, 1994, he was warned for late arrival at work (as he had been in the past); on January 1, 1995, he was admonished to improve his absenteeism problem; on March 11, 1996, he was warned for late arrival; on May 14, 1996, for being too long in bathrooms; on July 31, 1996, for excessive absences; on August 21, 1996, for a negative attitude, being too long in bathrooms; and on November 21, 1996, he was suspended 5 days for absences and late arrivals. In his performance review of December 5, 1996, Ramos was told to improve his attendance and bathroom use. Ramos is still employed.

Juan Negron also received multiple warnings. Thus on September 28, 1993, he was warned for not wearing safety goggles; on April 27, 1995, he was warned for prolonged bathroom breaks with detours to the cafeteria and talking to other employees in bathrooms; on May 3, 1995, along with others, he was given a warning for having left work a few minutes early; May 14, 1996, for prolonged bathroom use; on July 31, 1996, for excessive absences; on August 21, 1996, for too long in bathrooms; and on November 21, 1996, he was given a 5-day suspension for excessive absences. Negron's evaluation of October 25, 1996, stated that his absenteeism record needs to be improved. Negron is still employed.

Apparently some kind of an altercation occurred between Hernandez and Supervisor Manuel Cruz shortly before Hernandez was discharged and Hernandez brought a complaint under the Puerto Rico penal code. On July 2, 1996, there was a preliminary hearing at which Arturo Figueroa Rios, a brother of the Union's president and an attorney who represents the Union, was present, but not in a representative ca-

pacity. He testified that Curz ''indicated to the Judge that he had instructions from his immediate supervisor to watch all those that were involved in Union movement, particularly Mr. Eddie Hernandez, who was one of the leaders.''

There was no official transcript of these proceedings. However, Figueroa testified that the Respondent's attorney made a tape recording, an assertion not denied by counsel.

Cruz denied he made the statement testified to by Figueroa. This direct credibility conflict I resolve in favor of Figueroa. I found his demeanor more positive. In addition, undenied is Figueroa's assertion that counsel for the Respondent made a tape recording of the hearing. Thus, I find that he did so. Since it was not offered into evidence, I must further conclude that recording would have tended to favor Figueroa's version, rather than the denial of Cruz.

B. *Analysis and Concluding Findings*

On these facts the General Counsel argues that Hernandez was discharged because of his union and other concerted activity protected by Section 7 of the Act. The Respondent contends that he was discharged for cause.

The previous cases amply demonstrate antiunion animus. The statement of Cruz that he was instructed to watch employees involved in the union movement, particularly Hernandez merely adds to the animus demonstrated in the two previous cases, but is not necessary to this finding. It has been previously found, and is undenied, that Hernandez was in fact the leader during the second election campaign. The precipitating event leading to the discharge of Hernandez was his have been in the bathroom for 16 minutes on May 2. Though the Respondent contends that Hernandez was discharged for his overall record, the immediate cause was, at worst, trivial employee misfeasance.

These factors lead me to conclude that the Respondent's motivating cause for discharging Hernandez was his overt union activity. An additional factor was no doubt his having filed two claims with the Puerto Rico Department of Labor. There is, however, no indication in his testimony or the exhibits that Hernandez filed the safety complaint on behalf of any other employees. In the claim for vacation pay, Hernandez requested that the pay of other employees also be investigated. Whether this minimal evidence would serve to establish that Hernandez was engaged in concerted activity as the law not stands is problematical. See *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), which overruled *Alleluia Cushion Co*., 221 NLRB 999 (1975). The continued validity of *Meyers* has recently been questioned by a panel majority of the Board. *Aroostoook County Regional Ophthalmology Center*, 317 NLRB 218 (1995). Thus it may be that the Board would consider these claims by Hernandez to be concerted activity protected by the Act. However, since I conclude that his union activity was a significant motivating cause of the discharge, findings, and conclusions need not be made on this issue.

Therefore, the burden is on the Respondent to establish that it would have discharged Hernandez notwithstanding his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 393 (1982). In approving the *Wright Line* analysis, the Supreme Court stated that to meet this burden the employer must show more than a plausible reason for the discharge. The employer must prove that it would have taken the same action even in the absence of the union activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The Respondent failed to meet this burden.

The Respondent's basic argument is that Hernandez had demonstrated a negative attitude over the previous year and one half and other known union supporters are still employees. The facts are clear, however, that other employees whose records are not substantively different from that of Hernandez have not been discharged. Negron and Ramos were given 5-day suspensions after having several written warnings each. So far as this record reveals, only Hernandez has been discharged although others have had many and diverse attendance and other work related problems, including overuse of the bathrooms.

Given the demonstrated tolerance with which the Respondent treats employees who are late for work, miss work, and take too long breaks, I must conclude that discharging Hernandez was more than typically severe punishment. Therefore, I reject the Respondent's asserted reason for discharging Hernandez, and conclude that but for his union activity Hernandez would not have been discharged.

IV. REMEDY

Having concluded that the Respondent committed an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Eddie Hernandez to his former job or, if that job no longer exists, to a substantially identical position of employment and make him whole for any loss of wages or other benefits he may have suffered in accordance with the formula set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Wallace International de Puerto Rico, Inc. and International Silver de Puerto Rico, Inc., San German, Puerto Rico, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their activity on behalf of Congreso de Unions Industriales de Puerto Rico.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Eddie Hernandez immediate and full reinstatement to his former job or, if that job no longer exists, to a

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''